Re Tioh Ngee Heng; ex p Yap Kiu Lian @ Norhashimah Yap (Administratrix of the estate of Mohamad Shariff bin Haji Hussain)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D5–29–3555 OF 1998
STEVE SHIM J
19 JANUARY 2000

Bankruptcy *— Notice — Application to set aside — Failure to serve applications within prescribed period of 14 days — Judgment debtor did not disclose existence of counterclaim, set-off or cross-demand which equals or exceeds amounts claimed in the notice — Whether applications should be allowed — Rules of the High Court 1980 O 32 r 13(2)(a)*

The judgment debtor applied to set aside the bankruptcy notice pursuant to rr 95 and 18 of the Bankruptcy Rules 1967 respectively. The senior assistant registrar dismissed his applications, hence this appeal. The judgment creditor oppossed the applications on the following grounds: (i) failure to serve the applications within the prescribed period of 14 days in accordance with O 32 r 13(2)(a) of the Rules of the High Court 1980 ('the RHC'); and (ii) failure of the judgment debtor to disclose in his affidavits the existence of any counterclaim, set-off or cross-demand which equals or exceeds the amounts claimed in the bankruptcy notice.

Held, dismissing the appeal:

(1) There has been non-compliance with O 32 r 13 of the RHC in regard to the service of the affidavit opposing the bankruptcy notice. Order 32 r 13 of the RHC is mandatory as opposed to being merely directory. Thus, the affidavit opposing the bankruptcy notice under the r 95 application by the judgment debtor was inadmissible and ought to be rejected (see p 157E–G).

(2) The judgment debtor has failed to disclose in his affidavits for an r 95 application the existence of any counterclaim, set-off or cross demand which equals or exceeds the amount claimed in the bankruptcy notice and which the judgment debtor would not have raised in the main action. It is essential that a debtor must show creditable evidence and has to condescend to particulars of the existence of the counter-claim, set-off or cross demand. In the present case, the judgment debtor has merely made bare allegations (see p 157H–I).

[Bahasa Malaysia summary

Penghutang penghakiman memohon untuk mengetepikan notis kebangkrapan menurut kk 95 dan 18 Kaedah-Kaedah Kebangkrapan 1967 masing-masing. Penolong kanan pendaftar menolak permohonan beliau, oleh itu rayuan ini dibuat. Pemiutang penghakiman

menentang permohonan-permohonan tersebut atas alasan berikut: (i) kegagalan untuk menyampaikan permohonan-permohonan tersebut di dalam tempoh 14 hari yang ditetapkan menurut A 32 k 13(2)(a) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'); dan (ii) kegagalan penghutang penghakiman untuk mengemukakan di dalam afidavit-afidavit beliau kewujudan apa-apa tuntutan balas atau tolakan yang menyamai atau melebihi jumlah yang dituntut di dalam notis kebangkrapan tersebut.

Diputuskan, menolak rayuan tersebut:

(1) Terdapat ketidakpatuhan dengan A 32 k 13 KMT berhubung dengan penyampaian afidavit tersebut yang menentang notis kebangkrapan tersebut. Aturan 32 k 13 KMT adalah mandatori dan bukan hanya merupakan suatu panduan. Oleh itu, afidavit menentang notis kebangkrapan di bawah permohonan k 95 oleh penghutang penghakiman tersebut tidak boleh diterima dan patut ditolak (lihat ms 157E–G).

(2) Penghutang penghakiman telah gagal untuk mengemukakan di dalam afidavit-afidavit beliau untuk satu permohonan k 95 tentang kewujudan apa-apa tuntutan balas atau tolakan yang menyamai atau melebihi jumlah yang dituntut di dalam notis kebangkrapan dan yang mana penghutang penghakiman tidak perlu timbulkan di dalam tindakan utama. Adalah penting seorang penghutang perlu menunjukkan keterangan yang boleh dipercayai dan menunjukkan butiran-butiran yang terdapat pada tuntutan balas atau tolakan tersebut. Di dalam kes ini, penghutang penghakiman telah hanya membuat dakwaan-dakwaan kosong (lihat ms 157H–I).]

Notes

For cases on applications to set aside a bankruptcy notice, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1708–1724.

Cases referred to

Datuk Lim Kheng Kim v Malayan Banking Bhd [1993] 2 MLJ 298 (refd)

de Lasala v de Lasala [1979] 2 All ER 1146 (refd)

Hadkinson v Hadkinson [1952] 2 All ER 567 (refd)

Haron bin Mohd Zaid v Central Securities (Holdings) Bhd [1982] 2 MLJ 94 (refd)

Isaacs v Robertson [1985] AC 97 (refd)

Malaysian National Insurance Sdn Bhd v Lim Tiok [1997] 2 MLJ 165 (refd)

Sovereign General Insurance Sdn Bhd v Koh Tian Bee [1988] 1 MLJ 304 (refd)

Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd [1996] 2 MLJ 334 (refd)

Legislation referred to

Bankruptcy Act 1967 s 3(1)(i)
Bankruptcy Rules 1967 rr 95, 18
National Language Act 1963/67 s 8
Rules of the High Court 1980 O 32 rr 13, 13(2)(a), 95, 276, O 92 r 1

Saran Singh (*Saran Singh & Co*) for the appellant.
Joslyne Delano Goonting (*ML Lum & Co*) for the respondent.

Steve Shim J: This is an appeal by the judgment debtor ('JD') against the decision of the learned senior assistant registrar in dismissing his applications to set aside the bankruptcy notice ('BN') pursuant to r 95 Bankruptcy Rules 1967 and r 18 thereof respectively. There applications are found in encls 4 and 7. The judgment creditor ('JC') had opposed both applications. In opposing the r 95 application at encl 4, the JC has raised a preliminary objection contending that it is inadmissible for non-compliance with O 32 r 13(2)(a) Rules of the High Court ('RHC'). Here, counsel for the JC has submitted that whilst the said application was filed on 18 November 1998, it was only served on the JC's solicitors on 5 February 1999 despite repeated requests and therefore there has been a failure to serve the said application within the prescribed period of 14 days under O 32 r 13(2)(a) RHC which can be invoked in the absence of any provision for service of such an application under the Bankruptcy Rules citing in support r 276 thereof which stipulates:

> In the absence of any rule regulating any proceeding under the Act or these Rules, the Rules of the High Court shall apply mutatis mutandis.

Counsel further contends that O 32 r 13 RHC is mandatory as opposed to being merely directory.

Let me say without more that I accept the above legal proposition. I agree there has been non-compliance of O 32 r 13(2)(a) RHC. It is significant to note that there has been no reply to the above preliminary objection. Counsel for the JD has made no submission in rebuttal. No affidavit has been filed by the JD explaining the delay of well over 60 days in serving the said application at encl 4.

Having regard to the legal and factual circumstances, I find that there is sufficient merit in the preliminary objection and accordingly I hold that the r 95 application or more specifically the affidavit opposing the BN at encl 4 to be inadmissible and ought to be rejected on that score.

In my view, the said r 95 application should also be rejected on the ground that the JD has failed to disclose in his affidavits the existence of any counter-claim, set-off or cross-demand which equals or exceeds the amounts claimed in the BN and which the JD would not have raised in the main action: (see *Datuk Lim Kheng Kim v Malayan Banking Bhd* [1993] 2 MLJ 298). It is essential that a debtor must show by credible evidence and has to condescend to particulars of the existence of the counter-claim, set-off or cross-demand. In the instant case, the JD has merely made a bare allegation that he has a counterclaim, set-off or cross-demand but failed to

condescend to any particulars or that it is genuine or one which he could not have raised in the action in which the order was obtained, etc. A

Perhaps because of the legal inadequacies highlighted above that the JD decided to file a summons-in-chambers on 5 February 1999 at encl 7 to set aside the said BN on similar grounds. These grounds are premised on the assumption that the BN has been issued and is based upon the original judgment dated 27 August 1984. Counsel for the JD has submitted that since the consent order dated 24 August 1984 is but a method of enforcing the original judgment, this original judgment therefore forms the basis in the issuance of the BN. It is further contended that the BN is statute-barred because it was issued more than 12 years after the original judgment was given. B C

On a closer perusal of the BN, it seems clear that it is based on the consent order dated 24 August 1994 and not on the original judgment. A consent order is no different from any other order of the court. In *Malaysian National Insurance Sdn Bhd v Lim Tiok* [1997] 2 MLJ 165, Edgar Joseph Jr SCJ had said that, in terms of efficacy, there was no distinction between a consent order and any other order of the court, citing with approval the observation of Lord Diplock in *de Lasala v de Lasala* [1979] 2 All ER 1146 who said at p 180: D

> Financial arrangements that are agreed on between the parties for the purpose of receiving the approval and being made the subject of a consent order by the court, once they have been made the subject of the court order, no longer depend upon the agreement of the parties as the source from which their legal effect is derived. Their legal effect is derived from the court order ... E

It should be noted that the issuance of a BN has to be founded upon a final judgment or a final order. This is reflected in s 3(1)(i) Bankruptcy Act 1967, in particular the proviso therein. In the instant case, the consent order stipulates payment by the JD of a quantified sum of RM33,000 in instalments providing for payment of interest in the event of default. Clearly, it finally disposes the rights of the JC and the liability of the JD. It is therefore in the nature of a final order: (see *Haron bin Mohd Zaid v Central Securities (Holdings) Bhd* [1982] 2 MLJ 94). It is also significant to note that the consent order has not been set aside nor has the JD taken any step to challenge it. It is trite law that an order, even if irregular, is valid and enforceable until set aside. This principle is particularly relevant in bankruptcy proceedings where the court generally will not look behind the judgments or order save in very limited circumstances of fraud or illegality, etc. In *Isaacs v Robertson* [1985] AC 97, Lord Diplock speaking for the Privy Council approved the proposition advanced by Romer LJ in *Hadkinson v Hadkinson* [1952] 2 All ER 567 who said at p 569: F G H

> It is the plain and unqualified obligation of every person against, or in respect of, whom an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void. Lord Cottenham, LC, said in *Chuck v Cremer* (1846) 1 Coop temp Cott 338 at p 342, 47 ER I

884 at p 885): 'A party, who knows of an order, whether null or valid, regular or irregular, cannot be permitted to disobey it. It would be most dangerous to hold that the suitors, or their solicitors, could themselves judge whether an order was null or valid-whether it was regular or irregular. That they should come to the court and not take upon themselves to determine such a question. That the course of a party knowing of an order, which was null or irregular, and who might be affected by it, was plain. He should apply to the court that it might be discharged. As long as it existed it must not be disobeyed.' Such being the nature of this obligation, two consequences will, in general, follow from its breach. The first is that anyone who disobeys an order of the court is in contempt and may be punished by committal or attachment or otherwise.

This principle has been followed by our Supreme Court in *Sovereign General Insurance Sdn Bhd v Koh Tian Bee* [1988] 1 MLJ 304.

Having regard therefore to the true facts and the law, I must hold that the JD's proposition that the BN has been issued or is premised upon the original judgment dated 27 August 1984 to be quite baseless and I reject it accordingly.

As a parting shot, the JD has attempted to cast doubt on the validity of the BN on the ground that it was filed in the English Language as opposed to being filed in Bahasa Malaysia. He seems to contend that there has been a violation of O 92 r 1 RHC and s 8 National Language Act 1963/67. Order 92 r 1 RHC states:

> Any document required for use in pursuance of these rules shall be in the national language and may be accompanied by a translation thereof in the English Language;
>
> Provided that any document in the English Language may be used as an exhibit with or without a translation thereof in the national language.

And s 8 National Language Act 1963/67 states:

> All proceedings (other than the giving of evidence by a witness) in the Federal Court, the Court of Appeal, the High Court or any Subordinate Court shall be in the national language. Provided that the court may either of its own motion or on the application of any party to any proceedings and after considering the interests of justice in those proceedings, order that the proceedings (other than the giving of evidence by a witness) shall be partly in the national language and partly in the English Language.

Quite clearly, the statutory provisions empower the court the discretion to allow the use of the English Language in court proceedings in certain circumstances - the paramount consideration being the attainment of truth and in the interest of justice: (see *Yomeishu Seizo Co Ltd & Ors v Sinma Medical Products (M) Sdn Bhd* [1996] 2 MLJ 334).

In the instant case, undoubtedly the BN was filed in the English Language. It should have been filed in the national language. However, it was accepted and sealed by the court registry. There might have been good reasons for doing so. They might have exercised their discretion in accordance with the Registrar's Circular No 5/1990 dated 28 July 1990 which apparently permits the continued use of the English Language in the filing of certain documents pertaining to bankruptcy and winding-up. In

any event, having being sealed, it is therefore clothed with the authority of the court thereby giving rise to a presumption of regularity. The maxim 'omnia praesumuntur rite esse' applies. In the circumstances, it is quite obvious that the parting shot delivered by the JD has missed its mark completely. For the reasons stated I have to agredecision of the learned senior assistant registrar. Accordingly, I will dismiss this appeal with cost.

Appeal dismissed.

Reported by Wong Siok Chin